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No. 06-1188

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This Brief *amicus curiae*,[1] submitted in support of Petitioner Teck Cominco Metals, Ltd. ("Petitioner") with the written consent of both Petitioner and Respondents Pakootas, Michel and the State of Washington, addresses the first question presented by Petitioner.[2] Canada views the Ninth Circuit's holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, can be applied and enforced unilaterally to extend liability to a Canadian company for the ultimate

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[1] No counsel for a party authored this Brief in whole or in part. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this Brief.

[2] The second question raised in the Petition for Certiorari appears to present purely a matter of United States law, which Canada believes to be more appropriately for the parties to address.

consequences of its actions in Canada as failing to consider three relevant and important international law issues: long-standing diplomatic practice and treaties between Canada and the United States, comity of nations and the related international law norm of national treatment. Because Canada believes its views on a matter of significant concern to the Government of Canada and its citizens would materially assist this Court in deciding the Petition, Canada respectfully submits this Brief, addressing these issues and their application to this and similar cases.

THE INTEREST OF *AMICUS CURIAE* THE GOVERNMENT OF CANADA

Canada is the sovereign state in which Petitioner is domiciled and which, together with the province of British Columbia, is responsible for regulating the conduct of Petitioner. Canada therefore has an interest in ensuring that the present dispute is dealt with through a process consistent with the established approach to Canadian-U.S. transboundary environmental concerns, which have long been addressed through bilateral cooperation. As sovereign, Canada also has a strong interest in seeing that principles of international law and comity are respected in the resolution of transboundary disputes.

Specifically, the Canadian Government has a compelling interest in preserving the viability of diplomatic mechanisms for resolving disputes with the United States that implicate boundary issues. These mechanisms include a valid treaty to which Canada and the United States are parties and other internationally recognized procedures available to both countries. In this case, where there are well-established diplomatic procedures and precedents for resolving issues of transboundary water pollution, including through bilateral negotiations or pursuant to the Treaty

Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, CUS 312 (the "Boundary Waters Treaty"), the issue raised by the Petition presents a matter of recurring and special importance to the Government of Canada.[3]

Regardless of the particular method of non-judicial resolution, Canada has a vital sovereign interest in having this dispute settled through diplomatic measures, rather than by unilateral adjudication in the domestic courts of the United States.[4] The Government of Canada also has a strong

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[3] As noted in the Petition for Certiorari, in June 2006, Petitioner and the United States Environmental Protection Agency ("EPA") reached a settlement outside the framework of CERCLA. Petition for Certiorari at 5. The settlement, which was the culmination of years of concerted diplomatic efforts by Canada and the United States, resulted in EPA's withdrawal of its Unilateral Administrative Order against Petitioner (the "UAO") and the agreement that an affiliate of Petitioner based in the United States would conduct a comprehensive study of the environmental effects of the pollutants discharged from the Canadian smelter at issue in this case. App. to Pet. Cert. 120a. Despite the extra-judicial resolution of the dispute between EPA and Petitioner, outside the context of CERCLA, plaintiffs in this case continue to seek injunctive relief to enforce the UAO against Petitioner and compelling Petitioner to take actions to correct its alleged violations of the UAO and CERCLA. *Id.* at 118a-119a. *See Pakootas* v. *Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1071 n.10 (9th Cir. 2006). Plaintiffs also seek a declaratory judgment that Petitioner has violated and continues to violate CERCLA, civil penalties "to the maximum extent permitted by CERCLA" for each day that Petitioner allegedly violated the UAO and attorneys' fees. App. to Pet. Cert. 118a-119a; *see Pakootas*, 452 F.3d at 1071 n.10. Canada continues to have an interest in the bilateral resolution of these outstanding disputes in accordance with established diplomatic practices of Canada and the United States in these particular circumstances.

[4] Notwithstanding Canada's strong interest in a bilateral, diplomatic resolution of this dispute, rather than a unilateral adjudication by private parties in a United States court, the Government of Canada does not condone – indeed it disagrees with – Petitioner's assertions that the Ninth Circuit's decision "could provoke retaliatory actions against American interests by Canada or her courts," or affect Canada's policy regarding its

interest in preserving its sovereign right to regulate Canadian persons and companies operating in Canada, without interference from private lawsuits in U.S. courts.

Canada confines itself to arguments based in international law and does not address United States law, except where helpful to elucidate international law principles.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in failing to consider the existing framework for diplomatic resolution of the issues raised by the private plaintiffs in this suit, as well as fundamental principles of comity and customary international law respecting non-interference by one sovereign with the internal affairs of another sovereign, and equitable principles of equal treatment of nationals and non-residents. The court of appeals refused to consider these important legal norms even though it admitted that "'neither a logician nor a grammarian will find comfort in the world of CERCLA,'" *Pakootas*, 452 F.3d at 1079-80 (quoting *Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863, 883 (9th Cir. 2001)), and that certain provisions of the statute contain language that "is by no means clear" – which, indeed, "does not make literal or grammatical sense as written." *Id.* at 1080. Thus, the Court of Appeals held that CERCLA applied in this case to a Canadian company that conducts all of its operations in Canada, even thought it acknowledged that the text of the statute "does not indicate whether foreign corporations are covered," indeed, that "CERCLA is silent

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military presence in Afghanistan, which were made without the knowledge or sanction of the Government of Canada and reflect a complete misunderstanding of Canadian governmental policy and process. Petition for Certiorari, at 21, 22.

about *who* is covered by the Act." *Id.* at 1076, 1077 (emphasis in original). The Ninth Circuit admittedly broke new ground regarding the applicability of CERCLA without once giving weight, or even thought, to precedent for deciding similar disputes diplomatically or to principles of comity and customary international law.

Given the facts, and the novelty of the legal issues raised by this case and the Ninth Circuit's decision, Canada's preferred approach is to have the present transboundary environmental dispute resolved completely and finally through established diplomatic channels, not through a private lawsuit in the courts of the United States. The United States likewise has determined not to proceed by litigation; EPA and Petitioner have reached an extra-judicial resolution of the dispute, outside the framework of CERCLA. *See supra* note 3; Petition for Certiorari, at 5.

A government-to-government resolution of the pending disputes, as proposed by Canada in this Brief and in its prior *amicus curiae* submission to the Ninth Circuit, has the advantage of promoting comity by enabling a balance to be achieved between, on the one hand, Canada's interests in maintaining water quality in Canada and preserving its sovereign right to regulate Petitioner's operations in Canada, and, on the other hand, the United States's interest in water quality within its own sovereign territory. Government-to-government resolution would also help to ensure avoidance of future conflicts and inconsistencies in the application of the two countries' laws by substituting cooperation for unilateral action. A cooperative approach will also have the benefit of giving companies operating on both sides of the border confidence that they will not be risking liability under the unfamiliar laws of the neighboring country. The result of the Ninth Circuit's decision interpreting CERCLA in such a way that the statute can be pronounced to be non-extraterritorial is that companies located along the border

remain vulnerable to the risks and burdens of both sovereigns' regulations, which may be in conflict.

Canada recognizes the possibility that some cases involving transboundary pollution may appropriately be resolved in the domestic courts of Canada or the United States. This is not such a case, however, as the settlement between Petitioner and EPA emphasizes. *See supra* note 3; Petition for Certiorari, at 5. Resolution through private litigation is both unnecessary and, in this case, incompatible with the basic principle of comity of nations, as recognized and applied by Canadian and United States courts for centuries.

Leaving complete resolution of the underlying transborder issues to diplomatic or treaty mechanisms would have the additional benefit of furthering comity by avoiding application of CERCLA to Petitioner in circumstances that offend the international law norm of national treatment.

Accordingly, this Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Ninth Circuit, so that the issues in this case can be resolved completely and finally between the two affected sovereigns, or at least, be resolved in a way consistent with international legal norms and considerations of comity.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT TRANSBOUNDARY ENVIRONMENTAL ISSUES SHOULD BE RESOLVED THROUGH STATE-TO-STATE BILATERAL COOPERATION AND NOT THROUGH PRIVATE LITIGATION.

Traditionally, Canada and the United States have worked cooperatively to solve transboundary environmental issues through bilateral negotiations or pursuant to the Boundary Waters Treaty, which plainly applies in this case.[5] The Treaty created the International Joint Commission (the "IJC"), which has had a long, successful history of operation. *See, e.g.*, Trail Smelter Arbitration, (U.S. v. Can.), 3 R.I.A.A. 1905 (1938-1941), reprinted in 35 Am. J. Int'l L. 684 (1941).[6]

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[5] Article IX of the Boundary Waters Treaty provides that Canada and the United States "agree that . . . matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, *shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.*" Boundary Waters Treaty, art. IX, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, CUS 312 (emphasis added). It is common practice for the countries to submit a joint reference to the International Joint Commission to encourage acceptance by both parties of the Commission's recommendations.

[6] The Trail Smelter Arbitration, in which the IJC managed an air pollution dispute between Canada and the United States, is widely regarded as a highly successful, seminal decision in international law. *See* Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality,*

The Ninth Circuit gave a nod to the past success of extra-judicial resolution of transboundary environmental disputes concerning air pollution between Canada and the United States, through arbitration, with respect to the specific source of pollution complained of in this case – the Trail Smelter located and operating in Trail, British Columbia. *See Pakootas*, 452 F.3d at 1069 n.5. The Ninth Circuit nevertheless rejected Canada's suggestion (in a brief *amicus curiae*) that a diplomatic, non-judicial resolution should be pursued in this case, rather than extending the reach of CERCLA. In doing so, the court not only ignored the fact that the IJC was created for the specific purpose of resolving disputes such as the one underlying this case, but also that the IJC has, over time, maintained consistent credibility with Canada and the United States. *See, e.g.*, Parrish, *supra*, at 417-18 & n.289.[7]

Indeed, the longstanding practice of the two countries has been to deal through diplomatic means with environmental issues of mutual concern. The ongoing Canadian-United States cooperation regarding environmental issues is evidenced by the 1972 Agreement on Great Lakes Water Quality, Apr. 15, 1972, U.S.-Can., 23 U.S.T. 301, CTS 1972/12. Canada and the United States have also entered into the Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, Can.-U.S., T.I.A.S. No. 11,099, CTS 1986/39, and the Canada-United

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International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes, 85 B.U. L. Rev. 363, 420 & n.306 (2005) (quoting Alfred Rubin as stating that "[e]very discussion of the general international law relating to pollution starts, and must end, with a mention of the Trail Smelter Arbitration").

[7] Canada and the United States have also entered into a Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, U.S.-Can., 15 U.S.T. 1555, CTS 1964/2, Article XVI of which provides for resolution of disputes by reference by either sovereign to the IJC.

States Joint Inland Pollution Contingency Plan, July 25, 1994, U.S.-Can.,[8] to address spills and other environmental emergencies along the Canada-United States border. Canada and the United States each implemented the Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit. (for Canada), 39 Stat. 1702, CUS 465, and the Agreement on Air Quality, Mar. 13, 1991, U.S.-Can., 30 I.L.M. 676, CTS 1991/3.[9] Both countries are also parties to the Memorandum of Agreement on Shellfish Sanitation, Mar. 4, 1948, U.S.-Can., T.I.A.S. No. 1747, CTS 1948/10.

These treaties, and a long history of bilateral cooperation, underscore the unique potency of non-judicial resolution of the issues before this Court. Moreover, the Boundary Waters Treaty directly addresses the issues raised by plaintiffs in this case. As noted previously, Article IX of the Treaty provides that "whenever" either sovereign requests that "questions or matters of difference" regarding their common boundary be referred to the IJC for examination and report, such questions or matters "shall be [so] referred." Boundary Waters Treaty, art. IX, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, CUS 312. In the spirit of bilateral cooperation, all references to date have been joint.

In these circumstances, the Ninth Circuit's ruling that this case may proceed under CERCLA, in United States courts, in derogation of the procedures that both Canada and the United States have endorsed in the past, and which Canada proposed in this instance, clearly disregarded the fundamental rules of comity.

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8 *Available at* http://yosemite.epa.gov/oswer/ceppoweb.nsf/vwResourcesByFilename/jcpcan.pdf/$File/jcpcan.pdf (last visited April 30, 2007).

9 Since its creation, the IJC's jurisdiction has included air emissions, which can also have a damaging effect on boundary and transboundary waters. The Agreement on Air Quality has enabled action on acid-rain causing emissions by both countries and on ground level ozone (smog).

II.

THE COURT OF APPEALS ERRED BY PRESUMING THE APPLICATION OF CERCLA WITHOUT CONSIDERING THE PRINCIPLE OF COMITY OF NATIONS.

A. The Principle of Comity of Nations.

The United States Supreme Court has acknowledged the importance of comity of nations since the earliest days of its jurisprudence. The formulation of comity that is perhaps most pertinent in this case is that articulated by the Court in *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 544 n.27 (1987), describing comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." While comity is not "a matter of absolute obligation" that courts must always follow, it is equally not a matter "of mere courtesy and good will." *Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895). It is, rather, "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Id.*

Principles of comity are also firmly established in Canadian jurisprudence. Indeed, as the Supreme Court of Canada has observed, "[t]he notion of comity has retained its vitality in the jurisprudence of Canadian courts." *Spar Aerospace Ltd.* v. *Am. Mobile Satellite Corp.*, 4 S.C.R. 205, 219 (Can. 2002).

The Supreme Court of Canada has repeatedly defined comity in terms that echo decisions of this Court. In *De Savoye* v. *Morguard Investments Ltd.*, 3 S.C.R. 1077, 1096 (Can. 1990), the Supreme Court recognized that "'[c]omity'

in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* Rather, because it is founded on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws," comity cannot legally be disregarded. *Id.* (citing *Hilton*, 159 U.S. at 163-64). *See also Pro Swing Inc.* v. *Elta Golf Inc.*, 2006 A.C.W.S.J. 157, at **26 (Can. 2006) (invoking the definition of comity developed by the United States Supreme Court in *Hilton*, 159 U.S. at 163-64); *Spar Aerospace*, 4 S.C.R. at 219 (same).

As the Supreme Court of Canada explained in *Morguard*, 3 S.C.R. at 1097, "[t]he ultimate justification for according some degree of recognition" to the laws of other nations "is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted." (Internal citations omitted). *See also Amchem Prods. Inc.* v. *British Columbia Workers' Comp. Bd.*, 1 S.C.R. 897, 913-14 (Can. 1993).

B. The Ninth Circuit Ignored Comity In Concluding That CERCLA Could Be Applied to Petitioner In This Case.

The Ninth Circuit's disregard of these well-established principles was particularly improper in this case. The court of appeals expressly acknowledged that the text of CERCLA is far from clear, in noting specifically that the statute lacks any indication that Congress intended it to be applied to foreign corporations. *Pakootas*, 452 F.3d at 1076,

1077, 1079-80. For that reason, the court chose to interpret CERCLA in a manner that ostensibly made its application non-extraterritorial.

Regardless of its nomenclature, the Ninth Circuit's decision nevertheless subjects Canadian companies, such as Petitioner, to conflicting regulatory schemes and infringes Canada's strong sovereign interest in regulating its own corporate citizens. Yet, it is well settled that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004).

Indeed, it is a well-established tenet of comity that where "one construction of a United States statute would bring it in conflict with the law of another state that has a clearly greater interest, . . or would subject a person to conflicting commands, . . . while another construction would avoid such a conflict, the latter construction is clearly preferred, if fairly possible." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. g (1987) (hereinafter "RESTATEMENT"). As this Court has explained,

> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony-a harmony particularly needed in today's highly interdependent commercial world.

Empagran, 542 U.S. at 164-65.

Even if the application of CERCLA in this case was not "extraterritorial," there can be no question that its extension to Petitioner amounts to the application of a U.S.

regulation to a foreign entity domiciled and operating exclusively in a foreign jurisdiction. Yet, the Ninth Circuit did not even acknowledge, let alone analyze, the relevant factors for determining whether a state may reasonably prescribe laws with respect "to a person or activity having connections with another state," such as Petitioner in this case. *See* RESTATEMENT § 403(1). Those factors include the existence of justified expectations that might be protected or hurt by the regulation, the extent to which the regulation is consistent with the traditions of the international system, the extent to which another state may have an interest in regulating the activity and the likelihood of conflict with regulation by another state. *Id.* § 403(2).

In this case, where the Ninth Circuit expressly found that the statute was unclear and did not evince any congressional intent to extend it to foreign corporations, the court's disregard of these fundamental principles of comity was improper, for had it "take[n] account of the legitimate sovereign interests" of Canada, as it ought, it may well have reached a different result. *Empagran*, 542 U.S. at 164.

C. Principles of Comity Are Violated By the Ninth Circuit's Holding That CERCLA Could Be Applied To Foreign Companies Operating Solely Outside the United States.

The Ninth Circuit's decision offends comity for the additional reason that, as discussed in Petitioner's opening brief to the Ninth Circuit, CERCLA's provisions pertaining to "federally permitted releases" allow United States companies charged with violations of CERCLA to rely on United States environmental permits as exemptions to liability under CERCLA, but such permits and corresponding exemptions are not available to non-residents

such as Petitioner. Nor do Canadian environmental permits provide any basis for an exemption from CERCLA liability.

The application of CERCLA to Teck Cominco is thus inequitable and also inconsistent with the international law principle of national treatment. See EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 101 (1915) (Foreign governments' willingness to permit local courts in other states to exercise jurisdiction over their citizens is predicated, *inter alia*, upon "[t]he existence of regular courts and of laws assuring to the alien the administration of civilized justice, on terms of equality with nationals.").

This inequitable treatment of Canadian companies may be exacerbated by CERCLA's adoption of the principle of joint and several liability; United States entities contributing to pollution at a site may be able to assert a "federally permitted release" exemption not available to a non-resident, leaving the foreign entity to face sole or disproportionate liability despite others' contributions to the pollution. Such an application of CERCLA would also harm Canada's interests by discouraging Canadian businesses from engaging in economic activity where that activity is located close to the border, regardless of their compliance with Canadian environmental law. Given the industrial presence on both sides of the border, the Ninth Circuit's approach would represent a radical shift in the pattern of reasonable accommodation by each country for the other's industries operating in proximity to the border.

CONCLUSION

In this case, the Ninth Circuit construed an admittedly ambiguous statute that is "silent about *who* is covered by the Act" to apply to a Canadian corporation

based on the eventual coming to rest in the United States of by-products of that corporation's operations in Canada. In finding that, notwithstanding the statute's silence, CERCLA can be applied to and enforced against Petitioner in this case, the court ignored the established practice of Canada and the United States of resolving transboundary environmental disputes such as the one presented here through established diplomatic channels. The court also improperly eschewed any consideration of the principles of comity of nations and customary international law, including rules respecting non-interference with the internal affairs of another sovereign, and equitable principles of equal treatment of nationals and non-residents.

Although it may be appropriate in some circumstances to address transboundary pollution through litigation in the domestic courts of Canada or the United States, unilateral adjudication is neither necessary nor appropriate in this case. Indeed, although plaintiffs continue to press their private claims against Petitioner, EPA is no longer seeking enforcement of its UAO against Petitioner, having arrived at a settlement outside the context of CERCLA and this lawsuit. This settlement emphasizes that, in this case, allowing the underlying transborder issues to be fully resolved through diplomatic or treaty mechanisms – consistent with the past practice of Canada and the United States – would also preserve comity between the two countries and free both Canadian and U.S. companies with border operations from risks of liability under the unfamiliar, foreign laws of the neighboring country.

Accordingly, the Government of Canada respectfully submits that the Petition for a Writ of Certiorari should be granted and the decision of the Ninth Circuit should be reversed so that the issues can be resolved completely and finally between the two affected sovereigns, or, at least, be

resolved in a way consistent with international legal norms and considerations of comity.

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